

OAG 10-008

November 3, 2010

Subject: For the purposes of compliance with Kentucky's prevailing wage laws, whether the cost estimate for a public construction project is determined by the public authority's estimate submitted to the Department of Workplace Standards or by the amount of the awarded contract.

Requested by: State Representative Robert R. Damron

Written by: Tad Thomas
Assistant Deputy Attorney General

Syllabus: In order to comply with Kentucky's prevailing wage laws, the estimated cost of a public construction project must be determined by the notification of the project's estimated cost submitted by the public authority to the Department of Workplace Standards.

Statutes construed: KRS 337.010(3)(a); KRS 337.510; KRS 337.512

OAGs cited: OAG 2-483; OAG 80-547

Opinion of the Attorney General

The City of Nicholasville ("City") sought to solicit bids for a water line installation project. Its estimated cost of the project was \$307,026, however, after publishing notice and soliciting bids it chose to accept a bid for \$216,513 from Bull of the Woods Enterprises ("Bull"). KRS 337.010(3)(a) requires any project fairly estimated to cost more than \$250,000 to pay the prevailing wage in the area. The Labor Cabinet ("Cabinet") received eight complaints that Bull did not

pay the prevailing wage to its employees. On February 11, 2010, State Representative Robert R. Damron requested an opinion of the Attorney General pursuant to KRS 15.020, asking “what estimated amount should be used to determine whether the \$250,000 threshold is met and whether prevailing wages are to be paid in a public works job.” Pursuant to long-standing policy of this office, a written request was made to the Labor Cabinet for its opinion on the matter and supporting documentation. The Labor Cabinet provided correspondence responsive to that request.

Background

The first prevailing wage law in the U.S. was passed in Kansas in 1891, requiring laborers employed by the state of Kansas to be paid at least the wage prevailing in the area.¹ Seven states followed suit between 1891 and 1923. The Davis-Bacon Act of 1931² was the first federal prevailing wage act. Its purpose was “to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.” House Committee on Education and Labor, Legislative History of the Davis-Bacon Act, 87th Cong., 2nd Sess., 1 (Comm. Print 1962). After the passage of the Davis-Bacon Act, seventeen additional states would pass prevailing wage laws modeled after it between 1931 and 1940, including Kentucky in 1940. A \$250,000 threshold was added to the Kentucky Prevailing Wage Laws in 1982. After amendments and repeals, the current Kentucky prevailing wage laws are similar to the Davis-Bacon Act.

Kentucky’s current prevailing wage laws are found in KRS 337.505-550, and definitions for their terms are found in KRS 337.010(3). KRS 337.010 provides, in relevant part,

- (1) Before advertising for bids or entering into any contract for construction of public works, every public authority shall notify the office³ in writing of the specific public work to be constructed, and shall ascertain from the office the prevail-

¹ Historical information in this paragraph is drawn from Philips, P. (1999). Kentucky’s Prevailing Wage Law: Its History, Purpose, and Effect, p. 12-19, *available at* http://www.faircontracting.org/PDFs/prevailing_wage/kentucky_prevailing_wage.pdf.

² Davis-Bacon Act of March 3, 1931, ch. 411, 46 Stat. 1494, as amended, 40 U.S.C. § 276(a).

³ “Office” means “the Office of Workplace Standards in the Department of Labor.” KRS 337.010(1)(b).

ing rates of wages... in the locality where the work is to be performed. This schedule of the prevailing rate of wages... shall be attached to and made part of the specifications for the work and shall be printed on the bidding blanks and made a part of every contract for the construction of public works.

- (2) The public authority advertising and awarding the contract shall cause to be inserted in the proposal and contract a stipulation to the effect that not less than the prevailing hourly rate of wages as determined by the executive director shall be paid to all laborers, workmen, and mechanics performing work under the contract... It shall be the duty of the public authority awarding the contract... to take cognizance of all complaints of all violations of the provisions of KRS 337.505 to 337.550 committed in the course of the execution of the contract, and when making payments to the contractor becoming due under the contract, to withhold, and retain therefrom all sums and amounts due and owing as a result of any violation thereof.

KRS 337.512 provides, in relevant part,

- (2) No member of a public authority authorized to contract for or construct public works shall vote for the award of any contract for the construction of such public works, or vote for the disbursement of any funds on account of the construction of such public works, unless such public authority has first ascertained from the executive director the prevailing rates of wages... and the determination of prevailing wages has been made a part of the proposal specifications and contract for such public works.

The definition for "construction" used in KRS 337.510 and KRS 337.512 is found in KRS 337.010(3), which provides, in relevant part,

- (a) "Construction" includes construction, reconstruction, improvement, enlargement, alteration, or repair of any public works project by contract fairly estimated to cost more than two hundred fifty thousand dollars (\$250,000).

KRS 337.010(3), KRS 337.510, and KRS 337.512 together require that for any contract for a public works project fairly estimated to exceed \$250,000, the public authority commissioning the project must consult the Department of Workplace Standards (“Workplace Standards”) for the prevailing wages, and insert them into the proposal specifications in the advertisement for bids and in the final contract. No public board member may vote to authorize a public works contract exceeding \$250,000 without including the prevailing wage as a provision.

The present issue arose when the City planned a water line installation project. As required by KRS 337.510(1), the City, through its project engineer, estimated the cost of the project to be \$307,026, notified the Department of the project, requested the prevailing wage schedule, and received it. The City then solicited bids for the contract, receiving eleven. Ten of the bids were over \$250,000; the eleventh was for \$216,513, submitted by Bull. The City awarded the contract to Bull. It is unclear whether a prevailing wage clause was included in specifications for bids or in the contract. During the project, the Cabinet received eight complaints that Bull was not paying the prevailing wage. The Cabinet investigated the complaints and confirmed them. On December 10, 2009, the Cabinet sent Bull a Notice of Violation, and requested \$87,520.99 in restitution for wages, and notified the City to withhold that amount from the contract and forward it to the Cabinet on January 13, 2010, in accordance with KRS 337.510(2). The City objected, arguing that the estimated amount of the project for the purposes of KRS 337.510(2) was the amount of the final contract. The Cabinet claimed that the estimated amount is that determined by the City’s project engineer, and State Representative Damron requested an opinion on the matter on February 26, 2010.

Discussion

The Cabinet argues that “fairly estimated to cost” in KRS 337.010(3) means “the amount contained in the notification of estimated costs received from the public authority.” The City argues that the relevant portion of KRS 337.010(3) is “by contract fairly estimated to cost,” which indicates that the relevant estimation of costs is that in the final contract. There are no controlling authorities on point, and no Cabinet regulations clarifying how the estimate is determined. We

find that the Cabinet's interpretation is more consistent with the overall statutory scheme, purpose, and treatment of similar statutes in other jurisdictions.

"The cardinal rule in statutory construction is to ascertain and give effect to the intent of the legislature. *Travelers Indem. Co. v. Reker*, 100 S.W.3d 756, 763 (Ky. 2003). "In construing a statute which is ambiguous, or is unclear, a court may look to a prior act... or one relating to the same subject matter, in order to arrive at the intent and purpose of the legislature. The court should look at the letter and spirit of the statute, viewing it as a whole; and should look also to the circumstances under which it was enacted." *City of Owensboro v. Noffsinger*, 280 S.W.2d 517, 519 (Ky. 1955). KRS 337.010(3)(a) is silent about who is supposed to determine the fair estimate of the project for the purposes of the prevailing wage laws, so other related statutes and the circumstances of enactment should be examined to help determine its meaning.

The overall statutory scheme indicates that the estimate is done no later than when the project is advertised for bidding. KRS 337.510(1) requires that before entering into a contract for a construction of public works, the prevailing wage must be requested from Workplace Standards before soliciting bids, and must be included in the specifications for bids. Since the prevailing wage is not necessary if it is not a construction for public works under KRS 337.010(3)(a), and anything under \$250,000 is not a construction for public works under KRS 337.010(3)(a), KRS 337.510(1) implies that the amount of the public work has already been estimated before asking for the prevailing wages from the Department of Workplace Standards. KRS 337.510(1) further requires the prevailing wages to be included as part of the specifications in any advertisement for bids, and KRS 337.510(2) requires them to be inserted into any contract. KRS 337.512(2) forbids any public board member from voting to accept a contract for construction of public works that does not contain the prevailing wage. These statutes require a definite order of operations, starting with obtaining the prevailing wage, then including it in the bid specifications, and finally including it in the final contract; once a prevailing wage is asked for, it must be included in the final contract. If the value of the contract for prevailing wage purposes were set by the final contract, as the City urges, compliance with KRS 337.510 and KRS 337.512 would require asking for the prevailing wage and including it in bids after the contract has already been made, which is inconsistent. In addition, KRS 337.520(4) also sets the prevailing wage as of the date the contract is advertised and offered for bid, further indicating that the application of the prevailing wage

has already been determined prior to offering the contract for bidding.⁴ In order to read these statutes together consistently, the estimate must be done by the time the contract is offered for bidding, although it is still not clear who does the actual estimating.⁵

The general purpose behind prevailing wage statutes also supports the Cabinet's view over the City's. The intent behind prevailing wage acts is "to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area." House Committee on Education and Labor, Legislative History of the Davis-Bacon Act, 87th Cong., 2nd Sess., 1 (Comm. Print 1962). Bull's bid was presumably based on wages lower than those in the prevailing area, as it paid its employees less than the prevailing wage, and its bid was the only bid out of eleven that was under \$250,000. The circumstances imply that Bull's bid was based on wages lower than those prevailing in the area, which runs counter to the purpose of prevailing wage statutes.

While not persuasive, statutes and cases from other jurisdictions can provide guidance in cases of first impression. *Knuckles v. Com.*, 2010 WL 2470850 at 3 (Ky. June 17, 2010). Although the City's interpretation has been explicitly incorporated into the corresponding statutes in the majority of other relevant jurisdictions, the fact that Kentucky's statute uses different language cuts against the City's interpretation. Of the 21 other states with prevailing wage laws and triggering thresholds, 13 of them specify in their statutes that it is the actual cost of the contract which determines whether the prevailing wage laws apply, and include no language about estimation.⁶ There are four states other than Ken-

⁴ See OAG 80-547.

⁵ KRS 337.520(4) also sets the prevailing wage as of the date the contract is advertised and offered for bid, indicating that the application of the prevailing wage has already been determined prior to offering the contract for bidding.

⁶ See A.C.A. §22-9-302(1) (Ark.); C.G.S.A. §31-53(g) (Conn.); HRS §104-2(a) (Hawaii); IC 5-16-7-1(k) (Ind.); 26 M.R.S.A. §1304 (Maine); MD Code, State Finance and Procurement §17-202(b)(1) (Md.); MCA 18-2-401(11)(a) (Mont.); N.R.S. 338.080 (Nev.); N.J.S.A. 34:11-56.26(11)(a) (N.J.); N.M.S.A. 1978 §13-4-11(A) (N.M.); Gen. Laws 1956, §37-13-3 (R.I.); T.C.A. §12-4-402(5) (Tenn.); 29 V.S.A. §161(a)(1) (Vt.). California's (CA Labor §1771) and New Jersey's (N.J.S.A. 34:11-56.26(11)(a)) statutes do not specify, but since the thresholds are \$1000 and \$9,850, respectively, they would likely be met by any public works project of any size. Alaska (AS §36.05.070(a)) and Delaware (29 Del. C. §6960) use the cost in the specifications for the contract and not the final contract itself, which imply procedures similar to Kentucky's.

tucky that explicitly use an estimated cost as the threshold for when the prevailing wage laws apply.⁷ The difference in statutory language may reflect a difference in legislative intent: if the Kentucky legislature wanted to base the prevailing wage threshold on the final contract, it could have done so as the other states did, but it chose to use “fairly estimated” instead, favoring the Cabinet’s interpretation.

Of the states that use estimations for the prevailing wage threshold, Ohio appears to be the only state to have directly addressed the issue of who does the estimating. Ohio has a similarly structured statute, and has explicitly refused to disambiguate it. *United Bhd. Of Carpenters & Joiners of Am. v. Beilharz Architects*, 2006 WL 3802187 at 5 (Ohio App. 3 Dist. Dec. 28, 2006). However, Ohio does have an administrative regulation which has been interpreted to require including the costs of the project based on the prevailing wage at the time of bidding, *Village of West Unity ex rel. Belz v. Merrilat*, 2004 WL 1171179 at 5 (Ohio App. 6 Dist. May 7, 2004), and has used a City Manager’s estimate in another case. *Zurz v. Reese Elec., Inc.*, 2009 WL 3183275 at 1 (Ohio App. 2 Dist. Oct. 2, 2009). Ohio’s handling of the issue provides some support for the Cabinet’s interpretation, but it is more notable for the complete absence of support it provides for the City’s position.

Like the Ohio court in *United Bhd. Of Carpenters*, this Office does not have the authority to expressly disambiguate the statute. However, it is the opinion of this Office that the statutory language, overall statutory scheme, and comparison of similar statutes and cases in other jurisdictions provides some support for the Cabinet’s interpretation, and none for the City’s interpretation. The estimation of the project value for prevailing wage purposes must be done before the bids are advertised, included in the specifications for the bids, and included in the final contract, thus making the notification of estimated costs sent by the public authority to Workplace Standards the most likely candidate for “fairly estimated” in KRS 337.010(3)(a).

Accordingly, it is our opinion that the most reasonable interpretation of “fairly estimated” in KRS 337.010(3)(a) is that it refers to the notification of

⁷ M.S.A. §177.43, subd. 7 (Minn.); R.C. §4115.03(B)(1) (Ohio); 43 P.S. §165-2(5) (Penn.); W.S. 1977 §27-4-402(a)(i) (Wyo).

estimated costs sent to the Department of Workplace Standards by the public authority. Since the estimation sent by the public authority in this case was for \$307,026, it would be a construction for public works, KRS 337.510 and KRS 337.512 would apply, and the prevailing wage should have been part of the contract and paid to the workers.⁸ The City should be bound by KRS 337.510(2) to withhold the difference in wages from the amount of the contract.

Jack Conway
Attorney General

Tad Thomas
Assistant Deputy Attorney General

⁸ *See also* OAG 2-483, in which a municipality that did not include the prevailing wages in a contract was advised to reject all bids and start over including the prevailing wage.